No. 20843

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TITLE INSURANCE AND TRUST COMPANY, Executor of the Estate of LUDWIG G. B. ERB, Deceased,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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Preliminary Statement.

Appellee in its Brief filed with this court continues to confine its argument to the single proposition that the decision must be based upon a consideration of two phrases contained in Section Six (the power of invasion clause) of the Erb Trust. Complete reliance is placed upon the granting to the trustee of "sole, uncontrolled discretion" and the "lily-gilding" words "or for any purpose whatsoever."

Ignored is the part these phrases play in the overall meaning of Section Six or the intention of the trustor generally as it appears from the total trust instrument and from the uncontradicted extrinsic evidence. Overlooked is our observation that Appellee's interpretation of the language of the invasion clause creates an ambiguity where it otherwise does not exist.

I.

The Language of the Trust Instrument in the Light of the Substantive Law of California, Provides a Sufficiently Definite Standard Limiting the Power of Invasion.

Appellee's sole argument in its answering Brief is the same argument that erroneously persuaded the lower court to grant the government's Motion for Summary Judgment. Appellee urges that decedent directed the trustee ". . . in its sole uncontrolled discretion . . ." to use any part of the corpus "for expenses of accident, illness or other misfortune or for any purpose whatsoever." See "Question Presented" and "Summary of Argument." (Govt. Br. pp. 2, 9.) Appellee further argues that the extent of the corpus ". . . that might be diverted on behalf of the widow under this power of invasion was not susceptible of prediction by any reliable objective standard. . . ." (Govt. Br. p. 9.)

The thrust of the government's "reasoning" is that the specific language "or for any purpose whatsoever" creates a discretionary power in the trustee to invade the corpus which is broader than any power found in the decisions which have held for the government. The government's and the lower court's theory is simply erroneous.

There is a myriad of federal estate tax cases involving the question of whether a charitable remainder is deductible where the corpus was subject to a power of invasion. Unlike various other areas of substantive law,

there has been no appreciable development of guidelines as to what "interest is presently ascertainable" in the language of Treasury Regulations §20.2055-2. The courts that have concentrated on the "crucial" language creating the standard of invasion have held in some cases for the taxpayer and in others for the government. See, for example, *United States v. Powell,* 307 F. 2d 821 (C.A. 10th, 1962) holding that "maintenance, welfare, comfort, or *happiness*" constitutes an ascertainable, judicially enforceable standard; *Estate of H. M. Harris,* 23 T.C. Memo 1965, 109, declaring that "support, comfort and happiness" does not constitute an ascertainable standard. In some instances language which would seem to create an ascertainable standard ("for the comfortable support and maintenance and for any other reasonable requirement") has not secured the deduction. *State Street Bank & Trust Co. v. U.S.,* 313 F. 2d 29 (C.A. 1st, 1963). Language which would seem to create too broad a power of invasion ("to meet any unusual demands, emergencies, requirements or expenses") has resulted in a judgment for the taxpayer. *Lincoln Rochester Trust Co. v. McGowan,* 217 F. 2d 287 (C.A. 2d, 1954). See also *Union Nat. Bk. of Clarksburg v. Looker,* 14 AFTR 2d 6208, ... F. Supp. ..... (D.C. W. Va., July 21, 1964), which found for the taxpayer even though the corpus could be invaded "to meet any emergency which shall arise from illness, misfortune, or other unusual condition."

Obviously there is an inherent difficulty with the governing federal statute and Regulation involved. I.R.C. §2055; Reg. §20.2055-2. This difficulty has created a hodgepodge of cases which litigants must look to as precedents. For this reason, we limited our discussion in our Opening Brief to the Supreme Court and Ninth Circuit decisions for the purpose of giving this court the judicial background of this much litigated question. The government has seen fit to assert that the words ". . . or for any other purpose whatsoever . . ." contained in the trust before this court "are far more sweeping and far less restrictive than those which have previously failed the ascertainable standard test." (Govt. Br. p. 22.) In addition to "comparing" two Supreme Court decisions, the government in an extremely limited manner sets out portions of the language of various decisions in which the courts have found for the government.

Each of the estate tax cases cited by the government in support of its position is distinguishable from the instant case for two reasons. First, none of those cases interpreted trusts under California law. Second, none of the cases present sufficiently comparable factual situations to be determinative here. It may be fairly concluded, although not stated in previous decisions, that most cases in the area of charitable deductions where a power of invasion is involved must be decided on an individual basis. "At this point the only generality that one can offer is that no ready touchstone is available which conveniently reveals the answer." (Paul, Federal Estate and Gift Taxation (1946 Supp.), pp. 436-437.)

A. The Extent of the Power Invasion, That Is, the Factor Which Determines if There Is an Ascertainable Standard, Must Be Decided Under California Law.

Appellee states, after the major portion of its Brief discusses the federal enactments and judicial decisions related to the issue before this court, that finally appellant "argues at length that, under California law, the power here to invade the corpus would be restricted to amounts needed to support Mrs. Erb in her accustomed manner, and that this power would have to be exercised in the light of her other available income from non-trust sources." (Govt. Br. p. 25.) We must point out to the court and to appellee that this is not an "additional" argument that we have added to our discussion of the Supreme Court and Ninth Circuit cases. It is clear that in determining whether an "interest is presently ascertainable" within the meaning of Treasury Regulations §20.2055-2(a), that the law of the state in which the trust is administered is controlling. *James v. Commissioner,* 40 T.C. 494, a Tax Court decision relied upon by appellee, points this out in stating that the remainder interest left to the charity "does not have a value which is capable of determination *unless the trustees are limited* in their invasion of the trust principal by some ascertainable standard." (Emphasis added.) Whether the trustees are so limited herein depends both upon the terms of the trust and California law.

Quotations from other authorities cited by appellee in support of its position follows:

> ". . . he who claims an ascertainable standard should produce 'clear and convincing proof' that local law enforces such a standard."
>
> (Paul, Federal Estate and Gift Taxation (1946 Supp.) p. 437.)

"The extent of the decedent's interest in her sisters' estates under the power to consume must be determined by Pennsylvania law. The taxability of the interest as so established will be determined by Federal Law . . . (Citations.)"

(*Strite v. McGinnes,* 215 Fed. Supp. 513, 515.)

"The will must be interpreted under Massachusetts law. 'State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.' (Citation.)"

(*Gammons v. Hassett,* 121 F. 2d 229, 231 (C.A. 1st, 1941), certiorari denied, 314 U.S. 673.)

It should be further noted that two of the cases cited in footnote three of Appellee's Brief on page 19 held that the power to invade the corpus was limited by local law and found for the taxpayer. The court in *Hartford-Connecticut Trust Co. v. Eaton,* 36 F. 2d 710 (C.A. 2d, 1929), stated: ". . . the question depends upon how the courts of Connecticut interpret such a provision." *United States v. Powell,* 307 F. 2d 821, 828 (C.A. 10th, 1962), held that under applicable local law (Kansas) the authorized invasion of principal for the "happiness" of the income beneficiaries "established an ascertainable, external and judicially enforceable standard and that the trustees, in exercising such power, were limited by such standard and the supervision and control of the courts of Kansas in the exercise of their equity powers."

B. The Federal Cases Cited by Appellee in Support of Its Position That No Ascertainable Standard Has Been Created by the Instant Trust Are Readily Distinguishable on Their Facts.

The United States Supreme Court decisions in *Merchants Bank v. Commissioner,* 320 U.S. 256 (1943) and *Henslee v. Union Planters Bank,* 335 U.S. 595 (1949) have been discussed at some length in our Opening Brief at pages 16-20. Appellee, in its peremptory discussion of these cases at pages 20-21 merely reiterates their holdings that the powers of invasion involved precluded deduction of the charitable remainder notwithstanding the unlikelihood of the exercise of the invasionary power.

Appellee does not comment upon the contentions made in our Opening Brief to the effect that the Supreme Court in *Merchants* relied upon the subjective nature of the standard, the direction to the trustee to be liberal in exercising the power of invasion, and the direction to the trustee to consider the interest of the life beneficiary prior to the claims of the residuary beneficiaries. Similarly in *Henslee* the income of the trust was to be used as the life beneficiary saw fit, while the trustees were directed to invade the corpus to expend an additional amount for the "pleasure, comfort and welfare" of the life beneficiary, again a subjective standard. The trustees were further instructed that the "first object to be accomplished . . . is to take care of and provide for my mother in such manner as she may desire . . ." and the charitable interest "is a residuary bequest . . . and is not to infringe on any of the other legacies hereinbefore provided." The above factors were determinative in each decision. None of them are present in the instant case.

The case of *Commissioner v. Sternberger's Estate*, 348 U.S. 187 (1955), is not in point as it involved a deduction of the actuarially computed value of a charitable bequest which was to take effect only if decedent's childless daughter died without descendants surviving her and the decedent. Section 81.46 of Treasury Regulations 105 stated that if the legatee was empowered to divert the fund to a use which would have rendered it not deductible, the charitable deduction will be limited to that portion of the fund exempt from the exercise of the power. The court's statement, quoted by appellee at page 13 of its Brief, to the effect that where the principal of a bequest to charity may be invaded for private purposes, only the amount that is *assured* the charity is deductible is limited to transfers subject to a condition under present Treasury Regulations §20.2055-2(b). The Regulations and judicial decisions governing the instant case are in no way so restrictive. Any power of invasion by the trustee would mean that no amount would be *"assured"* the charity. A charitable deduction is proper where, as stated in *Ithaca Trust Co. v. United States*, 279 U.S. 151, 154 (1929): "There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

The cases that follow are considered in the sequence which they appear in appellee's Brief:

In *Newton Trust Co. v. Commissioner*, 160 F. 2d 175 (C.A. 1st, 1947), the trustee was given a power "to make such payment or payments to or for the use and benefit of my said wife as it may in its sole discretion deem advisable." The court found that "use and benefit" connote considerably more than the maintenance

of a standard of living and that the term "benefit" means "whatever promotes welfare, advantage, profit." Massachusetts law did not support the taxpayer's position.

Merrill Trust Co. v. U.S., 167 F. Supp. 474 (D.C. Me., 1958), involved an invasion of principal when either life beneficiary determined that more than net income was necessary for her support. The judgment of the life beneficaries was stated by the trustor to be conclusive in this respect. The court held at page 480 that Maine law did not require that the trustee determine that the beneficiary was acting in good faith before complying with a request for payment of principal. Thus no fixed standard was present.

The court in *Gammons v. Hassett,* 121 F. 2d 229, 232 (C.A. 1st, 1941), looked to Massachusetts law to determine whether, a direction by the trustor to pay to decedent's wife the income and "so much of the principal thereof as my said wife may at any time and from time to time need or desire" would permit a deduction. The word "desire" was determinative in that local law did not limit the power of invasion to the maintenance of the wife's standard of living. The power of invasion based on the subjective whim of the life beneficiary was fatal to the taxpayer.

The recent case of *Zentmayer's Estate v. Commissioner,* 336 F. 2d 488 (C.A. 3d, 1964), involved a power of invasion for any purpose which the "trustees shall deem expedient, necessary or desirable for the *benefit* or use of . . . [the life beneficiary.]" (Emphasis added.) The court, at page 490, held that the trustees, under Pennsylvania law, *must* invade principal to the extent necessary to maintain the life beneficiary's

standard of living, and they *may* take additional funds from the principal if, in their judgment, the expenditures would be for her benefit or use. "Benefit" was defined by the Supreme Court of Pennsylvania as "anything that works to the advantage or gain of the recipient." A strong dissent in *Zentmayer* pointed out that Pennsylvania law allows the court to put itself in the position of the testator and that under the facts it is inconceivable that he intended the words in his will to mean anything more than that principal could be used only to assure that the life beneficiary, who was 80 years old and a "homebody," could continue in her prior mode of living.

De Castro's Estate v. Commissioner, 155 F. 2d 254, 256 (C. A. 2d, 1946), as pointed out by appellee, found the standard too vague where corpus could be invaded "if during the life of my wife . . . due to her illness, accident or other *unforeseen emergency,* the income of the two (2) trusts shall not be sufficient to *amply* provide for her needs. I especially direct that no one shall have the right to call in question the propriety or the amount so applied for my wife." The court adopted the Tax Court's opinion which stated:

> "While the conditions under which the corpus of the trusts here might be invaded, that is, in the event of 'illness, accident or other unforeseen emergency,' were somewhat more restricted than the Merchants National Bank of Boston case, still we can not say that they were, or are, so highly improbable of occurrence as to leave no uncertainty as to the vesting of or the amount of the charitable bequests. And once the way to the invasion is open it is entirely in the discretion of the trustee as to what amounts 'will amply provide for her (the wife's) needs.'"

The *De Castro* case obviously turned on the question of whether the likelihood of invasion was so remote as to be negligible. The Tax Court was influenced by the use of the word "amply" which was equivalent to a direction to be "liberal."

In *State Street Bank & Trust Co. v. U. S.*, 207 F. Supp. 955 (D.C., Mass., 1962), the District Court found for the government, on the ground that "requirement," where invasion was authorized for the life beneficiary's "comfortable support and maintenance and for any other reasonable requirement," actually meant "demand" under Massachusetts law and that "demand" was too subjective a standard. The Court of Appeals in a brief opinion (313 F. 2d 29) affirmed the District Court.

The Tax Court in *James v. Commissioner*, 40 T.C. 494 (1963) found for the government where the will, as appellee herein stated (Govt. Br. p. 23), used language ("or for any reason whatsoever") strikingly similar to the language in the instant case which the government wishes this court to limit its consideration. However, in *James* there was no intent expressed to limit invasion to remedy a need or want. The trustee therein was authorized to invade "*either for* comfortable maintenance and support, for educational requirements, illness, operations, or for any reason whatsoever which shall to my trustees, in their sole discretion seem sufficient." (Emphasis added). Apparently there was no consideration given to the question of how said language would be interpreted by local law.

Marine Trust Co. of Western New York v. U. S., 247 F. Supp. 278, 280 (W.D. N.Y., 1965), is the last case cited by appellee in attempting to compare the

trust language of the instant cases to prior federal decisions involving a charitable deduction. Appellee neglected to present the facts of the case. There the trustor specifically directed the trustee to pay the net income and "so much of the principal as may be necessary to maintain . . . [the life beneficiary] in the same standard of living which she shall have enjoyed." In a separate subsection the trustor *additionally* directed that "if by reason of sickness, accident or any other circumstances" his daughters were "in need of funds for health, support, maintenance, comfort, welfare or for any other reason" the trustee may also invade principal. In this regard a written request from either daughter for such payments was to be sufficient authority for the trustee to make such payments. The court found no ambiguity in wording or doubt as to the intention of the trustor.

None of the foregoing authorities relied upon by appellee is sufficiently similar to the instant case to support the government's position. We repeat for the benefit of the court Section Six, the provision authorizing invasion of the corpus, in the Erb Trust:

> "If at any time or times during the life of this trust, the Trustor—and after his death, the said EMMA ERB, if she shall survive him—shall be in want of additional moneys for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not; in such case of want or need, it shall be the duty of the Trustee, in its sole un-

> controlled discretion, to pay to or to use or to apply or to expend for the said Trustor or EMMA ERB, his said wife, as the case may be, such portion or portions of the corpus of this trust estate, up to and including the whole thereof, as the Trustee may deem necessary to meet such want."

The following factors in the instant case are significant in relation to the reasoning of the foregoing federal decisions:

1. The power of invasion by the trustee is in no way related to or to be measured by the subjective desires or wishes of the beneficiary;

2. There is no provision in the trust directing the trustee to be liberal in exercising his power of invasion on behalf of the life beneficiary;

3. There is no direction to the trustee that the trustor's first object was to provide for the life beneficiary or that consideration of the interests of the life beneficiary are paramount to the residuary beneficiaries;

4. The plain meaning of Section Six itself compels the conclusion that the trustor directed his trustee to invade the corpus to maintain Emma's accustomed standard of living if the need should arise. The trustor first set out circumstances in which the power of invasion shall be exercised—"*If* . . . Emma Erb . . . shall be in *want* of *additional* moneys for *reasonable* support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose what-

soever, whether included in the foregoing classification or not." He then said ". . . *in such case of want or need*, it shall be the *duty* of the Trustee" to invade the corpus "as the Trustee *may deem necessary to meet such want.*" The entire provision is drafted in terms of "want or need." It is totally illogical to limit the discretion of the trustee in invading the corpus to situations where the life beneficiary is in *"want* of *additional* moneys" or to preface the words "support, care and comfort" by the word *"reasonable,"* or to set out classifications which have characteristics of *emergency* ("accident, illness or other misfortune"), or to impose a *"duty"* on the trustee "to meet such *want,"* if the trustor had any intention of allowing the trustee to invade the corpus "for any purpose whatsoever . . . in its sole uncontrolled discretion" as the appellee suggests.

Appellee has taken the position that the last quoted language of the trust, considered by itself, is conclusive in this case. However, the test is "whether by *the terms* of the trust . . . the trustee's or beneficiary's power of invasion is limited by definite and ascertainable fixed standards." 4 Mertens, Law of Federal Gift and Estate Taxation (1959), 397. (Govt. Br. p. 15.) No authority suggests, as does the government in this case, that the question before this court should be controlled by only the specific provision granting the power of invasion, let alone certain portions thereof. Ostensibly, the appellee admits that the decedent's intent should be determined from the *four corners* of

the trust instrument. (Govt. Br. p. 26.) However, repeatedly appellee would have this court, as did the lower court, look only to the phrase "for any purpose whatsoever" without considering that this language is to be read in the context of the entire power of invasion provision which in turn must be interpreted in the light of other provisions (or lack thereof) in the trust. See Appellee's Brief, page 2: "Questions Presented"—"directions to the trustee . . . to use any part of the corpus 'for expense of accident, illness or other misfortune, or for any purpose whatsoever' "; page 7, "That provision, which is the basis of the present law suit . . ."; page 9, "Summary of Argument"—"invade the charitable remainders . . . 'for any purpose whatsoever' "; page 10, "The pertinent provision of the trust is Section Six . . ."; page 17, "The issue in the present case is thus narrowed to the question of whether the terms of Section Six . . ."; page 18, "The critical language of Section Six is . . ."; page 21, "The invasionary power which the decedent here granted to the trustee ('for any purpose whatsoever') . . ." Appellee further misleads the court in stating "the purposes for which the widow could and might *wish* to have the funds spent did not lend themselves to reliable prediction" (Govt. Br. p. 12) and "decedent wanted the trustee to invade corpus if necessary to satisfy any reasonable *desire* his widow might have." (Govt. Br. p. 30.) Nowhere in the trust instrument is the trustee directed or permitted to take into consideration Emma's subjective wishes or desires.

C. Although an Ascertainable Standard Should Be Discernible From the Plain Meaning of the Trust if Compared to Prior Federal Decisions, Interpretation of the Trust Under State Law Compels the Conclusion That the Trustee Is Limited in Its Power of Invasion to the Maintenance of the Standard of Living Which the Life Beneficiary Had Enjoyed at the Time of Decedent's Death.

In the closing pages of its Brief (pp. 25-30), appellee gives cursory consideration to the effect of California law on the interpretation and administration of the Erb Trust. Three points are urged. Appellee asserts that nothing can be read into a trust instrument not already there (p. 26), that the words "sole uncontrolled discretion" as applied to the invasion of the corpus result in a waiver by the trustor of the California requirement that the trustee must exercise reasonable judgment (p. 27), and that the trustee could invade the corpus for Emma's benefit without consideration of her other resources. (Pp. 27-29.) None of these three assertions is well founded.

There is no question that the general rule in California is that a trustor's intent is to be determined from the four corners of the trust instrument. (Govt. Br. p. 26.) The same rule is equally applicable to contracts and wills. Calif. Code of Civ. Proc. §1856. Of course, there are various exceptions to the rule that in interpreting a writing no evidence is allowed other than its contents. See Witkin, California Evidence, pp. 397-421. In ascertaining the meaning of an instrument wherein there is a patent ambiguity, parol evidence is admissible to interpret it. *Witkin, supra*, 413.

The parol evidence rule is no less applicable to trusts than to contracts or wills. In California, the courts

"in seeking the true construction of a trust instrument, *inter vivos* or testamentary as the case may be . . . must *if possible* ascertain and effectuate the intention of the trustor as expressed by the language of the instrument itself." (Emphasis added).) *Lombardi v. Blois*, 230 Cal. App. 2d 191, 197. Appellee misstates the rule in contending that "California courts would determine the decedent's intent from the four corners of the trust instrument *alone*." (Govt. Br. p. 26.) (Emphasis added.) The trust instrument is the primary, not the only, consideration in determining the nature, extent and object of a trust.

As stated in 2 Scott on Trusts (2d ed.) at page 828:

> "In determining the terms of the trust, resort is had in the first place to the instrument, if any, under which the trust is created. As to any matter expressly covered by the instrument, the provisions of the instrument, if unambiguous, determine the terms of the trust. In such a case, extrinsic evidence in the absence of fraud or mistake, is not admissible to vary or add to the terms of the instrument. Where the instrument contains no express provision or where a provision is ambiguous or uncertain in its meaning, resort may be had to extrinsic evidence to determine the terms of the trust."

Although the plain meaning of the Erb Trust limits the trustee's power of invasion to the maintenance of Emma's standard of living, the trial court's decision indicates that Section Six, which grants the power of invasion, if read as appellee and the trial court read it, is ambiguous in that such interpretation of the lan-

guage "or for any purpose whatsoever" is entirely inconsistent with the structure of the paragraph creating the power of invasion and the trust as a whole. In ascertaining the intention of the trustor, the court is not limited to determining what is meant by any particular phrase, but should consider the necessary implications arising from the language of the instrument as a whole. *Brock v. Hall,* 33 Cal. 2d 885, 889. This means that the language in a particular trust declaration is to be interpreted, not as an isolated statement of intention, but in the light of the entire declaration. *Randall v. Bank of America*, 48 Cal. App. 2d 249, 252. The lower court's construction of the scope of the power of invasion should be rejected as it is entirely inconsistent with the apparent purposes of the instrument taken as a whole and might well defeat one of the beneficent purposes of the trust, Ludwig's intention to benefit the charities. The meaning of particular words, phrases, and provisions is subordinate to the scheme, plan, or dominant purpose of the trustor. *Estate of Raymond*, 96 Cal. App. 2d 808.

If Section Six is ambiguous, then evidence of the circumstances surounding the execution of the trust agreement is admissible to explain any uncertainty appearing upon the face of the instrument. There is no evidence or implication that the paramount object of Ludwig's bounty was his surviving spouse. The trust must be read in the setting in which the trustor has cast it in order to ascertain his individual intention. "Intention" is significant in determining whether an ascertainable standard exists in that the trustee is bound by the trustor's intent. We will not repeat the circumstances surrounding the execution of the Erb Trust

or those that existed at the date of Ludwig's death, except to mention that Emma's income from her own estate and the anticipated income from the trust was far more than she needed for any reasonable purpose. It is clear that Ludwig created the power to invade the principal as a safeguard in the event Emma should be in need or want of additional funds due to any emergency; in short, the trustee was to invade corpus, if necessary, to maintain Emma in her accustomed standard of living.

Appellee also argues that the words "sole uncontrolled discretion" result in a waiver by the trustor of the requirement that the trustee exercise a "reasonable judgment" in invading the corpus. *Coberly v. Superior Court,* 231 Cal. App. 2d 685, is used to support this contention. It should be noted, however, that the quotation from *Coberly* set out by appellee (p. 27) is not supported by California authorities but taken *in part* from Restatement of Trusts, Second, Section 187(j). Appellee neglected to add the following language of Section 187(j):

> "In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, *so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act.* But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust or ordinarily to act arbitrarily without an exercise of his judgment." (Emphasis added.)

The *Coberly* case involved a petition for writ of mandate to set aside an order of the Superior Court sitting in probate, which struck objections to the first account of a testamentary trustee. The theory of the testamentary trustee in the lower court was that the beneficiary was not entitled to complain of neglect of duty in the administration of the trust, because the terms of the will creating the trust gave the trustee absolute discretion in the management of its assets. The appellate court disagreed with this theory stating at page 689:

> "The exercise of judgment by a professional trustee, even if not required to satisfy the standard of a reasonable prudent man, is the very purpose for which the trustee was employed, and exculpatory powers in the trust instrument are strictly construed. It ill behooves a professional trustee, holding itself out during the solicitation of business as a respository of special competence and expertise, to claim on an accounting it need not answer the charge of neglect of duty. A banker, a doctor, a lawyer, may not gain business as a specialist and defend mistakes as a layman. (Estate of Ferrall, 41 Cal. 2d 166, 174 [258 P. 2d 1009]; Bogert, Trust & Trustees (2d ed.) §542.)"

> "We believe that a grant of absolute discretion in the management of a trust still requires a professional trustee to affirmatively exercise its judgment in handling the trust assets. . . ."

In the instant case, the trustee was not given absolute discretion in the management of the trust nor

even as to whether to invade the corpus to satisfy the needs of Emma. Ludwig directed that "it shall be the *duty* of the trustee . . . to expend . . . such portions of the corpus . . . as the trustee may deem necessary to meet such want." It would seem that where the trustee is under a *duty* to act, the concept of "sole uncontrolled discretion" is completely inconsistent with that *duty*. This type of discretion is normally given to a trustee, as it was here, in determining the amount of corpus to be distributed in order that the trustee should not have to justify to the penny the amount of each and every distribution. There is no reasonable basis for concluding that Ludwig waived the exercise of the trustee's reasonable judgment in invading the corpus where necessary to permit Emma to live in her accustomed manner.

Additionally, contrary to appellee's contentions (Govt. Br. pp. 27-29), the trustee could not invade the corpus without looking to Emma's other resources. Appellee cites no authority in support of its contention other than *Estate of Ferrall,* 41 Cal. 2d 166, which held that the trustee should consider a beneficiary's other means in exercising his discretion to disburse the principal unless the language of the trust *affirmatively* reveals an intention to make a gift regardless of the beneficiary's other means. No such *affirmative* statement of intent is present in the Erb Trust.

Appellee in its Brief states (p. 28) that "the trust instrument affirmatively reveals an intention to benefit Mrs. Erb without regard to her personal resources."

Appellant is somewhat at a loss as to whether the government is actually trying to mislead this court or whether the statement is merely irresponsible, but a reading of the original trust instrument and the amendments thereto reveals no intention, either affirmatively or by implication, to benefit Emma without regard to her personal resources. On the contrary, the language of Section Six indicates that the trustee is to invade the corpus only after considering Emma's ability to meet her needs from her own assets and from other sources of income.

The trustor imposes a duty on the trustee to invade the principal on Emma's behalf if she "shall be in *want* of *additional* moneys" for certain purposes. The word "additional" certainly imposes a duty upon the trustee to consider whether there would be a "want of *additional* moneys" and, of course, the question to be answered would be "in addition to what?". The only logical answer would be "in addition to the truat income, her own assets and other sources of income."

Appellee states that appellant must overcome the rule of the Restatement of Trusts, Second, Section 128, Comment (e), that there is an inference that a beneficiary is entitled to support out of the trust fund even though he has other resources. The Restatement simply declares that the right to invade under such circumstances is a question of interpretation. Additionally, no California case can be found that cites the Restatement rule that an inference exists. It must be concluded that the California courts, in view of *Ferrall*, would restrict the trustee's power of invasion until Emma was "in want of additional moneys" for the specified purposes, after taking into consideration her other resources.

II.

A Reading of the Interpretative Regulations of the Treasury Department Discloses That the Regulations Themselves Are Inconsistent With Appellee's Position.

Appellee, although accepting our statement of facts and expressly conceding that there was no probability, as of the date of Ludwig's death, of invasion of corpus, made an important omission on its Brief in setting forth the applicable statute and Regulations.

In our Opening Brief (pp. 14-15), we invited the Court's attention to Treasury Regulations §20.2055-2 and quoted the pertinent language thereof. Appellee in its Brief (p. 5) refers to said Regulation but indicates that only section (a) thereof is material to this case. Said section (a), entitled "Remainders and Similar Interests," is directed at the typical life estate in favor of a private party with remainder over to a tax-exempt charity. If there were no power of invasion in the Erb trust, section (a) alone would be the controlling Regulation. However, the existence of Section Six of the trust, authorizing invasion of the corpus, requires reference to section (b) of said Regulation which is entitled "transfers Subject to a Condition or a Power."

That the omission by appellee of any reference to section (b) is not inadvertent becomes apparent from an examination of its language.

The court will note that section (a) makes a charitable remainder deductible ". . . only insofar as that interest is *presently ascertainable* . . . ." Where, as here, there is a power to invade, the extent to which the remainder is "presently ascertainable" cannot be deter-

mined without reference to section (b) which purports to be interpretative of the statute under such circumstances.

Said section reads as follows:

> "(b) *Transfers subject to a Condition or a Power.* If, as of the date of a decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is *so remote as to be negligible.* If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the occurrence of which appeared to have been *highly improbable* at the time of the decedent's death, the deduction is allowable." (Emphasis added.)

It is apparent that the Regulation drafted by the very governmental agency which seeks to deprive the charitable remaindermen of their tax-exempt status as beneficiaries under the Erb Trust is inconsistent with appellee's argument. Thus, appellee argues a position contrary to that expressed by a Regulation it consistently contends has the force of law. (*Helvering v. Winmill,* 305 U.S. 79.)

Paraphrasing section (b), ". . . as of the date of (Ludwig's) death (the) transfer(s) for charitable purposes (were) dependent upon the performance of

some act or the happening of a precedent event (invasion or noninvasion of the corpus) in order that (they) might become effective." Obviously, if the trustee distributed the entire corpus to Emma there would be no estate left to pass to the charities.

Section (b) goes on to state that under such circumstances no deduction is allowable unless ". . . the possibility that the charitable remainder will not become effective is so remote as to be negligible." Again, the Regulation states that if the charitable interest ". . . would be defeated by the performance of some act . . ." (*i.e.*, the invasion of the corpus), "the deduction is allowable if the occurrence of the act . . ." appears to be highly improbable at the time of decedent's death.

It is thus apparent that the Regulations themselves contemplate that, under the fact situation herein presented, whether the charitable remainder interest is presently ascertainable requires a determination as to whether the likelihood of invasion is "so remote as to be negligible" or is "highly improbable." Since it is conceded that the likelihood of invasion was "very small" and since the undisputed facts as to Emma's "age, private income and modest personal living habits" (Govt. Br. pp. 17-18) make it plain that invasion was "highly improbable" and "so remote (a possibility) as to be negligible," the government's position is not tenable.

Further, the improbability of invasion in the light of the circumstances at the time of Ludwig's death is inescapably confirmed by the fact that there was no

invasion up to the time of Emma's death, at which time the power terminated.

This latter compelling evidence may be properly considered probative of the unlikelihood of invasion at the time of Ludwig's death, rather than as conclusive evidence of the actual fact.

In *Lincoln Rochester Trust Company v. McGowan,* 217 F. 2d 287 (C.A. 2d, 1954), Judge Medina, after discussing *Henslee v. Union Planters Nat. Bank,* 335 U.S. 595, and earlier decisions, stated at page 293:

> "None of these authorities, however, sustain the broad proposition that evidence of events occurring after testator's death is never admissible. But they do impel the conclusion that, unless specifically provided for by statute, actual events occurring after the testator's death may never be substituted for the estimate of probable events made as of the time of the testator's death and based upon circumstances as they existed on that date. It seems quite clear, therefore, that only those events occurring after the testator's death which have sufficiently high probative value in establishing or clarifying the circumstances as they existed at the time of testator's death may properly be considered in making the factual determination as to the probability and extent of the exercise of a right to invade."

This court, in *Commissioner v. Wells Fargo Bank,* 145 F. 2d 130, at page 131, citing its earlier decision (133 F. 2d 753) stated:

> "This court in the Bank of America case, supra, relied on the Ithaca Trust Co. case, supra. We

> refused to follow the rule propounded herein by the Commissioner, that the mere existence of the legal power to invade the corpus of a trust in favor of a private individual defeats the charitable gift deduction, but rather *looked to the actualities of the situation,* found sufficient certainty of the value of the charitable bequest in the improbability of an invasion of corpus, and concluded that the deduction was allowable." (Emphasis added.)

See also: *Commissioner v. Robertson's Estate*, 141 F. 2d 855 (C. A. 4th, 1944); *Bowers v. South Carolina Natl. Bk.*, 228 F. 2d 4 (C. A. 4th, 1955).

In this court's earlier *Bank of America* decision the opinion included the following appropriate comment:

> "Naturally, cases arising under this statute present gradations of probability; and we do not wish to be understood as suggesting that charitable bequests in remainder are deductible where there is real likelihood of an undetermined part of the corpus being taken for the benefit of the life tenant. It is the duty of the Commissioner, in administering this statute, to give effect to the beneficent purpose of Congress, and we believe a proper performance of the duty requires that attention be paid to the *actualities of each case.* The administrative difficulties in the way of doing that are not insurmountable. On the other hand, a blind adherence to arbitrary standards must result in many instances in the needless frustration of the legislative policy." (Emphasis added.)

Conclusion.

The plain meaning of the trust sets out a presently fixed and ascertainable standard regarding the invasion of the corpus, to wit, the maintenance of Emma's standard of living out of the corpus if additional moneys are required in "case of want or need." Any interpretation under California law of the terms of the trust necessitates this conclusion.

It is regrettable that appellee in its overzealous desire to impose a tax on the interests of the six charitable remaindermen should attempt to read into the invasion clause a carte blanche power which was never intended. Although it denies such an effort (Govt. Br. pp. 26-27), its succeeding remarks ". . . even the 'reasonable judgment' standard has been waived by the trustor" belie this statement.

The phrase ". . . or any other purpose whatsoever" is not the all-encompassing language appellee paints it to be. As stated in *Estate of Wood,* 39 T.C. 919:

> "Admittedly, the words 'support', and 'maintenance' are regarded as referable to a standard of living, and the addition of the naked words 'comfort' and 'welfare' in the context of the instrument before us merely rounds out the standard of living concept."

The dissenting opinion in *Zentmayer's Estate v. C.I.R.*, 336 F. 2d 488, 492-3 (C.A. 3d, 1964) contained the appropriate language which follows:

> ". . . it can only be said that the scrivener of the will, in the mooted phrase, merely 'painted the lily' of the testamentary design."

The appellee in its Brief has not answered appellant's arguments, but has deliberately attempted to restrict the court's consideration to a limited portion of the trust rather than to its context and to the trustor's obvious intent. The tax cases cited by appellee as authority for its position are not determinative in that they are readily distinguishable. Further, none of the cases concerns a California trust.

It should be concluded that the trust, construed as a matter of law, discloses an intention to provide for a continuance of the mode of life and standard of living of the life beneficiary and that consequently, there is a sufficiently definite and fixed standard to permit ascertainment with reasonable certainty of the value, as of the date of death of the decedent, of the bequest to charitable remaindermen.

For the reasons stated in Appellant's Opening Brief and found herein, the judgment of the District Court should be reversed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

HENRY G. BODKIN, JR.